



1722 Eye Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 736-8640
Fax: (202) 736-8740

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EX PARTE OR LATE FILED

May 8, 1995

By Hand Delivery

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, Northwest
Room 222
Washington, D.C. 20554

RECEIVED
MAY - 8 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re: **GC Docket No. 95-21**, In the Matter of Amendment of 47
C.F.R. § 1.1200 et seq. Concerning Ex Parte Presentations
in Commission Proceedings; Memorandum of Ex Parte
Presentation

Dear Mr. Caton:

The Federal Communications Bar Association (the "FCBA"), by its undersigned representative, hereby respectfully submits the below-enumerated items for inclusion in the public record of the proceeding referenced above:

1. Two audiotape cassettes (labelled "FCBA CLE Seminar -- Ex Parte Rules (04/25/95)," "Tape 1 of 2" and "Tape 2 of 2"), on which are recorded the proceedings at the FCBA's continuing legal education seminar held on April 25, 1995 that included discussion of the merits of the proposals set forth in the Notice of Proposed Rulemaking in GC Docket No. 95-21, FCC 95-52, adopted and released on February 7, 1995, 60 Fed. Reg. 8995 (February 16, 1995); and

2. A copy of the set of written materials that were distributed to persons attending the seminar.

The enclosed items are being submitted to the Commission in accordance with Section 1.1206(a) of the Commission's Rules, albeit on a late-filed basis, and in accordance with the letter to the Commission's Acting Secretary jointly from the President of the FCBA and from the undersigned that was dated and filed with the Commission on April 10, 1995.

Due to physical limitations imposed upon making duplicate copies of the audiotapes, and in conformance with the undersigned's prior oral consultation with representatives of the Office of the Commission's General


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Mr. William F. Caton
May 8, 1995
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Counsel, we are submitting herewith for inclusion in the public record of this proceeding only one set of the audiotapes, and we are not providing copies of the audiotapes to the recipients of copies of this letter. A second copy of the set of the written materials that were distributed at the seminar is submitted herewith for inclusion in the public record of this proceeding, and copies of such materials are being provided to the recipients of copies of this letter.

In the event that there should be any questions concerning this matter, kindly direct them to the undersigned.

Very truly yours,



John Griffith Johnson, Jr.
Chair, Ex Parte Rules Committee
Federal Communications Bar Association
c/o Bryan Cave
700 Thirteenth Street, Northwest
Suite 700
Washington, D.C. 20005-3960
Telephone: (202) 508-6146
Telecopier: (202) 508-6200

Enclosures

cc: Ruth Milkman, Esq., with enclosures (partial) (by hand delivery)
William E. Kennard, Esq., with enclosures (partial) (by hand delivery)
David S. Senzel, Esq., with enclosures (partial) (by hand delivery)
Sheldon M. Guttman, Esq., with enclosures (partial) (by hand delivery)
Susan H. Steiman, Esq., with enclosures (partial) (by hand delivery)

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Federal Communications Bar Association

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

CLE SEMINAR - EX PARTE RULES

APRIL 25, 1995

Panelists: Alan Campbell, William Kennard,
Ruth Milkman and Linda Morgan
Moderator: John Griffith Johnson, Jr.

AGENDA FOR FCBA *EX PARTE* SEMINAR

- I. Introductions.
- II. William Kennard, General Counsel to FCC. Summary of FCC's outstanding proposals to amend *ex parte* communications rules.
- III. Alan Campbell, Private Practitioner. Contrast of how proposed new rules will work in practice when compared to existing rules. Discussion of Bar's approach to FCC staff under both regimes.
- IV. Linda Morgan, Chairman of the Interstate Commerce Commission. Discussion of her agency, its functions, and its *ex parte* communications rules and practices.
- v. Ruth Milkman, Senior Legal Advisor to FCC Chairman Reed Hundt. Insights on FCC's *ex parte* rules from perspective of agency decision maker and discussion of proper lobbying techniques by practitioners.
- vi. Questions and Answers from the Audience. Members of FCC's *Ex Parte* Rules Committee will be present to ask questions designed to stimulate dialogue and to address impact on Bar of new rules. While there will not be discussion of pending cases or controversies, it is anticipated that discussion of hypothetical scenarios will help to focus analysis of appropriate standards for contacts with governmental officials by the Bar and their clients.

FCC 95-52

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the matter of)	
)	
Amendment of 47 C.F.R. § 1.1200)	GC Docket No. 95-21
<u>et seq.</u> Concerning Ex Parte)	
Presentations in Commission)	
Proceedings)	

NOTICE OF PROPOSED RULEMAKING

Adopted: February 7, 1995 ; Released: February 7, 1995

Comment Date: March 16, 1995

Reply Date: March 31, 1995

By the Commission: Commissioner Barrett issuing a statement.

I. INTRODUCTION

1. In this Notice, we propose to amend the Commission's ex parte rules to make them simpler, clearer, and, in some instances, less restrictive. We propose generally to prohibit ex parte presentations only in proceedings in which such presentations are barred by the Administrative Procedure Act (APA). Ex parte presentations would be permitted in other proceedings but would have to be disclosed in the public record. We also address the question of whether the sunshine period prohibition contained in the ex parte rules should be modified. Finally, we present some miscellaneous proposals for making the ex parte rules more effective.¹ We believe that reform of the ex parte rules will improve the public's ability to communicate with the Commission in a manner that comports with fundamental

¹ Although the notice and comment process is not required for changes in rules of agency practice or procedure, such as the ex parte rules (see 5 U.S.C. § 553(b)(A)), we believe that it would be helpful to receive public input before making any major changes in our ex parte rules. We stress, however, that we may adopt proposals different from, or in addition to, those discussed in this Notice.

parte rules will improve the public's ability to communicate with the Commission in a manner that comports with fundamental principles of fairness.

II. BACKGROUND

2. The rules regulating ex parte presentations to the Commission represent an important means for preserving the public's confidence in the integrity of the Commission's processes. They are intended to ensure that the Commission's decisions are based on a publicly available record rather than influenced by off-the-record communications between decision-makers and outside persons. This objective is grounded on basic tenets of fair play and due process. Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations, 2 FCC Rcd 3011, 3012 ¶ 5 (1987)

3. To achieve this objective, the Commission, in 1965, adopted rules which established restrictions on ex parte communications in adjudications and certain other proceedings. Rules Governing Ex Parte Communications, 1 FCC 2d 49 (1965). Subsequently, in 1980, the Commission adopted disclosure requirements for ex parte communications in informal rulemakings. Ex Parte Communications Rulemaking Proceedings, 78 FCC 2d 1384 (1980), recon. denied, 93 FCC 2d 1250 (1983). Still later, in 1987, the Commission undertook a sweeping review of those rules. Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations, 2 FCC Rcd 3011 (1987), modified, 2 FCC Rcd 6053 (1987). That action was intended to simplify the application of the rules, modify them to reflect existing agency practice, and to clarify their scope to eliminate ambiguities. Id. at 3011 ¶ 1.²

4. The existing rules classify Commission proceedings into three categories: "restricted," "non-restricted," and "exempt." 47 C.F.R. § 1.1200(b). The rules include extensive lists, with various detailed exceptions, regarding how different proceedings are classified. See 47 C.F.R. §§ 1.1204(a), 1.1206(b), 1.1208(c). With respect to each category, the rules specify the treatment of ex parte presentations. Ex parte presentations are defined as communications to (or in the case of restricted

² The current rules also reflect several amendments to the rules adopted since 1987. See Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations, 3 FCC Rcd 3995 (1988); Amendment of the Commission's Ex Parte Rules, 4 FCC Rcd 4716 (1989).

proceedings also from) decision-making personnel³ directed to the merits or outcome of a proceeding, which: (1) if written were not served on the parties to the proceeding, and (2) if oral, were made without notice to the parties and without opportunity for them to be present. 47 C.F.R. §§ 1.1202(a), (b).

5. In restricted proceedings, ex parte presentations are generally prohibited.⁴ 47 C.F.R. § 1.1208(a). In non-restricted proceedings, ex parte presentations are permissible, but, in most cases, they must be disclosed. 47 C.F.R. § 1.1206(a). Specifically, written presentations must be filed with the

³ We believe that it is somewhat awkward to define ex parte presentations as being sometimes to decision-makers and sometimes from decision-makers. Accordingly, proposed § 1.1202(b), set forth in Appendix B, eliminates from the definition of "ex parte presentation" the distinction between communications to or from decision-makers. Instead, the rules prescribing the limitations on ex parte presentations stipulate in which direction the limitations apply. Additionally, proposed § 1.1202(c) defines decision-making personnel as generally including Commission personnel who may reasonably be expected to be involved in formulating a decision, and their staff. In this regard, in view of the possibility that staff members might discuss decisions with superiors and coworkers, we find it appropriate to treat the "reasonably be involved" standard expansively. Thus, we would consider a Bureau Chief and all Bureau personnel not part of a separated trial staff or otherwise explicitly excluded as decision-making personnel.

⁴ Some ex parte presentations are permissible even in restricted proceedings. Such "exempt" presentations include: (1) presentations authorized by statute or rule; (2) communications with the Office of General Counsel regarding judicial review of a matter that has been decided by the Commission; (3) presentations directly relating to an emergency in which the safety of life is endangered or substantial loss of property is involved; (4) presentations regarding military and foreign affairs and classified security information; (5) presentations involving another branch of the government concerning matters of shared jurisdiction; (6) certain presentations involving frequency coordination committee members; (7) presentations elicited by the Commission's staff, subject to certain service or disclosure requirements; and (8) presentations to or from the Department of Justice or the Federal Trade Commission involving matters which may affect competition in the telecommunications industry, subject to certain exceptions and disclosure requirements. 47 C.F.R. § 1.1204(b).

Commission for inclusion in the record.⁵ Those making oral presentations must file a memorandum containing any data or arguments not already reflected by that person's written submissions in the proceeding. *Id.* Finally, in exempt proceedings, ex parte presentations generally may be made without limitation. The rules do, however, contain restrictions on ex parte presentations in proceedings that are exempt but whose status could change upon the filing of a formal pleading. *See, e.g.,* 47 C.F.R. §§ 1.1204(a)(2) Note, 1.1204(a)(11) Note, 1.1208(b).

6. The rules impose an additional restriction for matters listed on a "Sunshine Agenda" for consideration at an open Commission meeting. Once a matter has been listed, and until a decision document is released or the matter is otherwise no longer under active consideration (the "Sunshine Agenda period"), no presentations (unless exempt) -- ex parte or otherwise -- may be made to decision-makers. 47 C.F.R. §§ 1.1202(f), 1.1203. There are exceptions to the sunshine period prohibition for Congress and other federal agencies in certain circumstances. Pub. L. No. 100-594, § 7, 102 Stat. 3022 (1988); 47 C.F.R. § 1.1203(c).

7. The rules also provide that information concerning possible violations of the ex parte rules should be referred to the Commission's Managing Director. 47 C.F.R. §§ 1.1212, 1.1214. If the Commission finds a violation of the ex parte rules, a range of sanctions may be applied. Parties to a proceeding who violate the ex parte rules may be required to show cause why their claim or interest in the proceeding should not be adversely affected by the violation. 47 C.F.R. § 1.1216. The Commission may also impose forfeitures for violation of the ex parte rules. 47 C.F.R. § 1.80.⁶

8. Based on our experience over the past seven years, we are concerned that the 1987 revision was not entirely successful in its goal of simplifying and clarifying the rules. Moreover, it appears that the existence of persistent questions regarding our rules reflects a need to reexamine their basis and to revisit the underlying issue of the best approach for ensuring the integrity of the Commission's processes. Accordingly, we seek

⁵ We consider electronic submissions transmitted in the form of texts, for example, by Internet E-Mail, as "written." *See Public Notice*, DA 94-240 (Gen. Counsel Mar. 16, 1994).

⁶ The current rules do not specify the circumstances in which particular sanctions would be applied. Commenters may wish to propose ways in which the rules could be made more specific in this regard.

comment on possible approaches to formulating a simpler, more effective set of rules. The following proposals reflect our tentative ideas in this regard.

III. PROPOSALS

9. Our primary proposal relates to the system by which we classify proceedings as restricted, non-restricted, or exempt. In order to reduce the complexity of our rules, it would be helpful to ground them on more clear-cut principles. We would thereby hope to eliminate confusion as to when and whether a particular proceeding is subject to a limitation on ex parte presentations. This would permit the public to anticipate the ex parte status of a proceeding without the need for what can amount to hairsplitting analysis. It would also enhance the perception that the restrictions, when imposed, reflect compelling public interest considerations. A second area of concern involves the sunshine period prohibition. We shall examine whether the sunshine period prohibition should be modified. Lastly, we identify several miscellaneous problem areas and propose solutions.

A. CLASSIFICATION OF PROCEEDINGS

10. The current system of classifying proceedings contains certain inherent complexities. These complexities arise because the current rules attempt to address individually the ex parte status of a large number of different proceedings and situations. Although this approach permits a degree of certainty to persons applying the rules to various situations, it also makes the rules relatively complicated. This complexity raises potentially serious questions. In particular, the need to address so many situations individually may point toward a lack of clarity in the defining principles underlying the rules. Moreover, we can appreciate that the need to parse a complicated set of rules may create uncertainty among persons dealing with the Commission.

11. As an example of this complexity, a person seeking to determine the status of an adjudicative licensing proceeding would discover (after consulting cross-references in 47 C.F.R. §§ 1.1202(d) and 1.1208(c)(1)(ii)) that under 47 C.F.R. § 1.1204(a)(1) such a proceeding is classified as exempt unless it: (1) is formally opposed or involves a formal complaint; (2) involves mutually exclusive applications; or (3) has been designated for hearing. The person would then have to refer to 47 C.F.R. § 1.1208(c)(1) to ascertain that, if any of the preceding events occurs, the proceeding is restricted. In addition, the person would have to refer to 47 C.F.R. § 1.1204(a)(2) Note, and § 1.1208(b) to determine whether ex parte presentations by certain persons may nevertheless be prohibited, although the proceeding is exempt.

12. The complexity of this approach is compounded because the rules refer to a multiplicity of specific types of proceedings. For example, 47 C.F.R. §§ 1.1208(c)(1)(ii)(A) and (B) alone make specific reference to proceedings under 14 different provisions of the Communications Act. Other sections of the ex parte rules also refer to multiple statutory provisions. Moreover, the rules have separate provisions addressing such matters as show cause proceedings, notice of inquiry proceedings, requests for declaratory rulings, Freedom of Information Act requests, tariff investigations, and proceedings before Joint Boards. See 47 C.F.R. §§ 1.1204(a)(3), (4), (6), (8); 1.1206(b)(10); 1.1208(c)(1)(ii)(D), (c)(4). In addition, in rulemaking orders in various substantive contexts, the Commission has established the ex parte treatment of certain categories of proceedings.⁷ Case law has also interpreted the rules and provided guidance that may not have been apparent from the face of the rules.⁸

13. We believe that a simpler system should be possible and would serve the public interest. A simpler system would permit persons applying the ex parte rules to rely on broad generalizations about how proceedings are treated -- generalizations that arise directly from the public interest rationale for the rules -- rather than having to sift through a minutely detailed classification scheme. Thus, the provisions specifying the scope of restricted, non-restricted, and exempt proceedings should be simpler. At the very least, the rules should not require extensive cross-referencing to pin down the status of a particular proceeding and to determine whether there are any exceptions that affect particular persons regardless of the classification. Additionally, we believe that use of the term "non-restricted" should be avoided altogether, since it misleadingly suggests that no restrictions are applicable. The

⁷ See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Buy-Through Prohibition, 9 FCC Rcd 4316, 4342 n.38 (1994) (subsequent history omitted) (appeals to the Commission from local franchising authority cable rate decisions will be treated as restricted proceedings); Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488, 3493 ¶ 42 (1991) (subsequent history omitted) (pioneer's preference requests are treated as restricted proceedings upon the filing of a formal opposition).

⁸ New York Telephone Co., 6 FCC Rcd 3303, 3308 n.23 (1991) (subsequent history omitted) (orders to show cause are treated as restricted proceedings upon the filing of a formal opposition to the position of the party against whom the order to show cause is issued).

term "permit-but-disclose" is more descriptive, and we shall adhere to this terminology in this notice.

Proposal: treat as restricted proceedings only those required to be restricted by the APA and those specified as restricted by the Commission on a case-by-case basis.

14. We propose, in the first instance, to follow the APA in defining the situations in which ex parte presentations are totally prohibited. We further believe that, in situations not covered by the APA, a permit-but-disclose rule would generally serve the public interest. Such a rule would allow persons to make ex parte presentations provided that the presentations were disclosed on the public record.

15. By way of background, the APA's restrictions on ex parte presentations are contained in 5 U.S.C. § 557(d). This section codifies Congress' action, in the Government in the Sunshine Act, Pub. L. No. 94-409, § 4, 90 Stat. 1241 (1976), "to provide for the first time a clear, statutory prohibition of ex parte contacts of general applicability." H.R. Rep. No. 880, 94th Cong., 2d Sess. 18, reprinted in [1976] U.S. CODE CONG. & ADMIN. NEWS 2183, 2228. Section 557(d) imposes a restriction on ex parte communications only in formal adjudications and rulemakings required to be determined on-the-record after an evidentiary hearing. 5 U.S.C. § 557(a).⁹ The section prohibits interested persons outside of the agency from making ex parte communications relevant to the merits of such proceedings to any member of an agency, administrative law judge, or other agency employee who may reasonably be expected to be involved in the decisional process of the proceeding. Ex parte communications from the agency employee to the interested person are also prohibited. 5 U.S.C. § 557(d)(1)(A), (B). The statutory provision further requires that the agency must apply the prohibition no later than the time at which a proceeding is noticed for hearing. 5 U.S.C. § 557(d)(1)(E). Additionally, the prohibition must apply to persons having knowledge that a proceeding will be noticed for hearing. *Id.*

16. With this background in mind, we turn to the question of whether it is necessary or appropriate for us to treat as restricted proceedings other than those covered by § 557(d). We

⁹ Consistent with the APA provision, the Communications Act provision restricting ex parte presentations by persons (including Commission personnel) who participated in the presentation of a case also applies after a case has been designated for hearing. 47 U.S.C. § 409(c)(1).

tentatively conclude that we should not treat other proceedings as restricted. Rather, our analysis indicates that, for proceedings not subject to the full panoply of procedural rights applicable to on-the-record proceedings, a permit-but-disclose rule would be appropriate and would serve the public interest.

17. Specifically, our analysis indicates that the legal principles underlying the regulation of ex parte communications do not require a more stringent approach. As courts have observed in dicta, informal contacts between members of the public and an administrative agency are the "bread and butter" of the administrative process and are completely appropriate so long as they do not "frustrate judicial review or raise serious questions of fairness." Louisiana Association of Independent Producers v. FERC, 958 F.2d 1101, 1113 (D.C. Cir. 1992).¹⁰

18. In this regard, the court in Louisiana Association, citing to earlier precedents involving informal adjudications and quasi-adjudicatory matters, indicated that ex parte contacts have the potential to frustrate judicial review where they result in "one administrative record for the public and [the reviewing] court and another for the Commission and those 'in the know'." Id. at 1112. Additionally, the court explained that ex parte presentations compromise the fairness of a proceeding where they reflect "[s]urreptitious efforts to influence an official charged with the duty of deciding contested issues upon an open record in accord with basic principles of our jurisprudence." Id.

19. Similar due process principles have led some courts to conclude that decision-makers should be insulated from ex parte contacts whenever agency action resembles judicial action -- including adjudication and quasi-adjudication¹¹ among conflicting private claims to a valuable privilege. Sierra Club v. Costle, 657 F.2d 298, 400 (D.C. Cir. 1981). See also Power Authority of the State of New York v. FERC, 743 F.2d 93, 110 (2d Cir. 1984)

¹⁰ Louisiana Association involved the consideration by FERC of numerous applications for gas pipeline certifications. A coalition opposing the certifications complained that FERC decision-makers had ex parte discussions with the proponents of the certifications. The court found that these discussions either did not relate to the merits of the applications or that, to the extent the merits might incidently have been addressed during the discussions, the contents of the discussions were disclosed on the public record. The court held that the discussions did not render the proceedings unfair.

¹¹ See Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224 (D.C. Cir. 1959) (discussing quasi-adjudication).

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(ex parte communications with "a judicial or quasi-judicial body regarding a pending matter are improper and should be discouraged").

20. Despite the unfavorable view of ex parte communications expressed in these cases, we do not believe that we are precluded from adopting a permit-but-disclose rule in adjudicatory proceedings outside the scope of § 557(d). The courts are principally concerned with undisclosed contacts. They have held that not all contacts pose a serious likelihood of affecting the agency's ability to act fairly and impartially in the matter before it. Power Authority, 743 F.2d at 110. "In resolving that issue, one must look to the nature of the communications and particularly to whether they contain factual matter or other information outside of the record, which the parties did not have an opportunity to rebut." Id. See also PATCO v. FLRA, 685 F.2d 547, 564-65 (D.C. Cir. 1982) (in making a fairness determination, it is relevant "whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond").

21. A rule providing for the timely disclosure on the public record of any ex parte presentations in these cases would serve the interests of fairness. It would provide "a reasonable opportunity to know the claims of the opposing party and to meet them." Morgan v. United States, 304 U.S. 1, 18-19 (1938). Thus, in Louisiana Association of Independent Producers v. FERC, 958 F.2d at 1112, the court held:

. . . acting upon the chance that the industry representatives were attempting subtly and indirectly to influence the outcome of this [gas pipeline certification] proceeding [during meetings with pipeline proponents], [footnote omitted] the Commission wisely placed summaries of these meetings in record. By doing so, it apprised the petitioners of any argument that may have been presented privately, thereby maintaining the integrity of the process and curing any possible prejudice that the contacts may have caused in this case. [citations omitted]

22. Furthermore, presentations made in good faith pursuant to a permit-but-disclose rule would not involve the type of egregious conduct that has previously evoked condemnation of ex parte communications. A person making communications in the expectation that they would be promptly reflected in the public record would not appear to be seeking "discriminatory and favored treatment," nor would such presentations constitute "surreptitious efforts to influence an official." See WKAT, Inc. v. FCC, 296 F.2d 375, 383 (D.C. Cir. 1961) (condemning improper attempts to influence decision-makers). Accordingly, we tentatively find that in adjudicatory-type proceedings outside

the scope of § 557(d) a permit-but-disclose requirement would be sufficient to prevent the concerns described by some courts. In other words, persons making presentations concerning such proceedings would either have to serve all parties to the proceeding or disclose the presentations in accordance with the procedures set forth in the rules.

23. We now turn to the separate issue of the considerations governing the treatment of presentations in policy-oriented rulemakings. We believe that in policy-oriented informal rulemakings, a permit-but-disclose rule would be an effective and desirable means of helping to compile a complete record to support our actions. We deem this consideration most relevant because due process issues are generally inapplicable to such rulemakings. Sierra Club v. Costle, 657 F.2d at 400; Action for Children's Television v. FCC, 546 F.2d 458, 474-77 (D.C. Cir. 1977). See also Pension Benefit Guaranty Corp. v. LTV Corp., 496 U.S. 633, 653-56 (1990);¹² Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524 (1978) (when the due process clause is not implicated and an agency's governing statute contains no specific procedural mandates, the APA establishes the maximum procedural requirements a reviewing court may impose). Although we find no statutory or due process requirement for us to report ex parte presentations in policy-oriented informal rulemakings, we believe that disclosure serves to enhance the value of the record. See Recommendation 77-3 of the Administrative Conference of the United States (Sept. 15-16, 1977), 1 C.F.R. § 305.77-3 (proposing that permit-but-disclose requirements be applied to informal rulemakings).

24. In exercising our discretion in this regard, we find useful guidance in Sierra Club, *supra*, although we recognize that this case involved a statute inapplicable to the Commission. There, the court held that the EPA had the discretion, consistent with the statute, to determine that oral communications were of "central relevance" to the outcome of a rulemaking and should be placed in the public file. 657 F.2d at 403-04. By central relevance, the court referred to "important communications that may have influenced the agency decisionmaking." *Id.* at 403 n.514. Similarly, with respect to our own processes, we believe that it would be desirable for us to exercise our discretion to ensure that the record contains any potentially important

¹² In Pension Benefit, the Supreme Court clarified Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), which, the Court held, merely mandates that "an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision." 110 S.Ct. at 2680. It thus does not establish any specific requirement to disclose ex parte presentations.

presentations. A permit-but-disclose rule efficiently accomplishes this purpose.

25. Based on the foregoing, we tentatively conclude that we have the authority to apply a permit-but-disclose rule to proceedings not covered by the prohibitions of 5 U.S.C. § 557(d), and we propose to do so.¹³ We believe that this approach provides a clear basis for analyzing the ex parte status of different proceedings and will therefore result in rules that are clearer and easier with which to comply. It puts the public on notice that permit-but-disclose is the operative principle whenever a person becomes a "party" to a proceeding unless the full panoply of hearing rights comes into play. Moreover, we believe that this approach serves to eliminate some unnecessary restrictions under the current rules. We see no reason why situations in which a trial-type evidentiary hearing has not been initiated -- such as informal adjudications and proceedings at the pre-designation stage -- should be treated as restricted. We are concerned that a total prohibition on ex parte presentations under these circumstances might unduly interfere with legitimate communications between the parties and the staff, when these communications -- provided they are disclosed -- pose no real danger of prejudice.

26. We therefore propose revised §§ 1.1204-1.1208, which are set forth in Appendix B to this notice. Under proposed § 1.1208, any matter designated for hearing before an administrative law judge or the full Commission would be restricted with respect to communications both to and by decision-making personnel.¹⁴ In such proceedings, ex parte presentations would be prohibited from the time that a hearing designation order or show cause order is released. The prohibition would also apply to decision-makers or others with knowledge that an order was in preparation. The release of such an order would be an appropriate point of reference for the application of the prohibition, because it directs the compilation of a formal hearing record. See 5 U.S.C. § 556(e) (formal hearing record).

27. One situation, however, warrants special treatment. When mutually exclusive applications which are not subject to an

¹³ As noted in footnote 9, *supra*, the restrictions of 47 U.S.C. § 409(c) as well as those of 5 U.S.C. § 557(d) apply to cases designated for hearing.

¹⁴ Although, consistent with the APA, we will treat all proceedings designated for hearing as restricted, we do not mean to imply that every proceeding which we choose to designate for hearing is required by statute to be heard "on-the-record".

auction or lottery are filed, it is very likely that they will ultimately be designated for comparative hearing.¹⁵ Thus, as under our current rules, such proceedings will be treated as restricted upon the filing of mutually exclusive applications not subject to auction or lottery, rather than upon designation for hearing.¹⁶

28. Additionally, in other specific cases, the Commission, or a Bureau or Office after consultation with the Office of General Counsel, would have an option to find that there is an unreasonable risk that ex parte presentations would be unfair either to interested persons or to the public. Such proceedings would be restricted upon the release of an appropriate order or public notice to that effect.

29. Under proposed § 1.1204, certain matters would be exempt from any ex parte limitations. In our view, these matters do not raise the concerns discussed above justifying a limitation on ex parte presentations. Such matters include notice of inquiry proceedings and, as a general matter, complaint proceedings in which the complainant does not serve the target of the complaint (but not formal complaints filed pursuant to 47 C.F.R. § 1.721).¹⁷ If circumstances warrant, on a case-by-case basis, interested persons would be informed, by order or public notice, that their presentations were subject to permit-but-disclose requirements. Commenters may wish to propose other types of proceedings which should be treated as exempt. For example, under the current rules, tariff proceedings prior to

¹⁵ By contrast, applications subject to lottery or auction would not be designated for evidentiary hearing unless questions were raised as to the applicants' basic qualifications. We currently treat auction proceedings as exempt unless they are designated for hearing or involve, for example, waiver requests. Public Notice, FCC 94-283 (Nov. 7, 1994). We request comment on whether such proceedings should be treated in the future as exempt or as permit-but-disclose.

¹⁶ We continue to apply, however, certain exemptions that apply under the existing rules to restricted proceedings prior to designation for hearing.

¹⁷ Although the complainant is not required to serve formal complaints filed under 47 C.F.R. § 1.721 (the Bureau transmits the complaint to the carrier), the filing initiates a formal adjudicatory-type section 208 complaint proceeding, which makes it appropriate to apply permit-but-disclose requirements. In contrast, informal common carrier complaint proceedings are initiated pursuant to 47 C.F.R. § 1.717. See discussion at paragraph 34, *infra*.

investigation are generally treated as exempt.

30. Under proposed § 1.1206, ex parte presentations in any proceeding not classified as exempt or restricted would generally be subject to permit-but-disclose requirements. We wish to stress that the fact that ex parte presentations are permitted in permit-but-disclose proceedings does not mean that Commission decision-makers are required to meet with parties. Commissioners and Commission staff will continue to have discretion to choose not to meet with parties where they believe that such meetings would not be useful. In addition, Commissioners and Commission staff will retain discretion to choose to meet with one party only if all other parties are present even if this is not required by the rules.

31. "Ex parte presentations" are defined as presentations which are not served on other parties (or, if oral, other parties are not given prior notice and an opportunity to be present). Consequently, it is important to recognize that, even if a proceeding were subject to permit-but-disclose requirements, presentations made by the sole party to a proceeding need not be disclosed under the proposed rule. That is because there would be no other "parties" involved to whom service or notice could be made under the definition of "ex parte presentation." The examples provided in proposed § 1.1206 make this clear. The types of proceedings potentially subject to the disclosure requirement, however, would include all informal adjudicatory proceedings (including applications, waiver requests, requests for declaratory rulings, and other filings seeking affirmative relief) and informal rulemaking matters.

32. In addition, for purposes of application of the permit-but-disclose rule to adjudicatory-type proceedings (including petitions for declaratory ruling), proposed § 1.1202 would define "parties" as the filer initiating an adjudicatory-type proceeding and anyone making a written submission regarding the filing which is served on the filer. Parties would also include other persons formally given that status, such as the subject of an order to show cause proceeding, and persons making written submissions about the party and served on the party. Generally, in complaint proceedings where the complaint is served on the target of the complaint,¹⁸ both the complainant and the target of the complaint are parties. Common carrier complaint proceedings, however, present special issues. As noted, in formal complaint proceedings under 47 C.F.R. § 1.721, both the complainant and the carrier would be deemed parties even if the complainant does not

¹⁸ In this context, it would be sufficient to constitute "service" if the complainant sent a courtesy copy of the complaint to its target.

serve the carrier. Under the existing ex parte rules, informal common carrier complaint proceedings initiated pursuant to 47 C.F.R. § 1.717 are exempt from ex parte restrictions. 47 C.F.R. § 1.1204(a)(5). Under our proposal, informal complaints would be exempt if the complainant did not serve the carrier (even if the Bureau referred the complaint to the carrier). We request comment on whether such informal section 208 complaints, even if served by the complainant on the carrier, should continue to be treated as exempt proceedings.

33. We also emphasize that the proposed definition of "parties" as used in the ex parte rules would not constitute a determination that such persons have satisfied any other legal or procedural requirements, such as the operative requirements for petitions to deny or timeliness requirements otherwise set forth in our rules. Nor would satisfying the definition of a "party" constitute a determination that they have any other procedural rights, such as the right to intervene in hearing proceedings. Rather, the definition would serve the limited purpose of triggering certain ex parte requirements. Moreover, the Commission might well determine that it is appropriate in some circumstances to terminate any requirement that such "parties" have that status under our ex parte rules. For example, if the Commission were to make a formal ruling that a particular "party" is not entitled to participate in a specific Commission proceeding, it might well determine that it is not appropriate to give the person "party" status even for limited purposes of the ex parte rules. We request comment on these proposals. Additionally, in light of our proposal to re-classify certain currently restricted proceedings as permit-but-disclose, we also seek comment on whether any other provisions of the current rules should be modified. See, e.g., §§ 1.1206(a)(3) Note 1, 1.1203(c) Note.

34. The following examples illustrate how the proposed rules would operate. After the filing of an uncontested application, the applicant would be the sole party to the proceeding. The applicant would have no other party to serve with any presentations to the Commission, and such presentations would therefore not be "ex parte presentations" as defined in our rules and would not have to be reported. On the other hand, in the example given, because the applicant is a party, a third person who wished to make a presentation to the Commission concerning the application would either have to serve the applicant or disclose any unserved presentations. Further, once the proceeding involved additional "parties" as defined above (e.g., an opponent of the applicant who served the opposition on the applicant), the applicant and other parties would have to either serve the other or disclose any unserved presentations.

35. In this regard, however, proposed § 1.1204(a)(8)(iii) retains an exception to the disclosure requirement contained in

the current rules. At times, the Commission or one of its Bureaus might find it desirable to undertake a formal or informal investigation related, for example, to an application or complaint subject to permit-but-disclose requirements. The purposes of the investigation might be frustrated if information obtained had to be disclosed contemporaneously. Accordingly, the proposed rules provide that decision-makers obtaining information in this manner may dispense with disclosure until an appropriate time if disclosure is necessary. See Amendment of Subpart H Part I, 2 FCC Rcd 6053, 6054 ¶¶ 10-14 (1987).

36. In rulemakings,¹⁹ the permit-but-disclose requirement would be triggered by the filing of a petition for rulemaking, the release of a notice of proposed rulemaking, a rulemaking order issued without notice and comment (for purposes of subsequent reconsideration or review), or another appropriate order or public notice. Proposed § 1.1202 in effect treats the public as being "parties" to rulemakings.²⁰ Thus, upon the release or filing of the document triggering the permit-but-disclose requirement in a rulemaking proceeding, all presentations regarding that proceeding would have to be disclosed as provided by the rule.

37. We seek comment on the above proposal. We also invite commenters to suggest any alternative means for simplifying and clarifying the rules. In particular, we are interested in the way other federal agencies, e.g., FTC, FERC, NRC, ICC, handle ex parte presentations and the extent to which their approaches might be workable for the Commission and consistent with relevant case law.

B. SUNSHINE PERIOD PROHIBITION

Request for comment: possible modification of the sunshine period prohibition.

38. The sunshine period prohibition imposes additional

¹⁹ In this regard, we propose to treat Joint Board-related proceedings in the same way as rulemakings.

²⁰ As a technical matter, rulemakings involve "interested persons" rather than "parties," which is one reason why due process issues are generally inapplicable to rulemakings. See Sierra Club v. Costle, 657 F.2d at 400 n.501. See also paragraph 25 supra. However, in view of our decision to apply a permit-but-disclose rule to both adjudicatory proceedings and policy-oriented rulemaking proceedings, we wish to use a consistent terminology with respect to all proceedings covered by the rule - hence, our reference to "parties" to a rulemaking.

restrictions on communications regarding matters pending before the Commission for consideration. The Sunshine Agenda period is defined as beginning with release of a public notice listing a matter for consideration at an open Commission meeting (the Sunshine Agenda) and ending with (1) the release of the text of a decision or order dealing with the matter, (2) issuance of a public notice that the matter has been deleted from the agenda, or (3) issuance of a public notice that the matter has been returned to the staff for further consideration. 47 C.F.R. § 1.1202(f). During this entire period, presentations, whether ex parte or not, are prohibited, unless requested by the Commission or its staff or coming within other enumerated exemptions. 47 C.F.R. § 1.1203.

39. Unlike the other provisions of the ex parte rules, the sunshine period prohibition was not adopted primarily as a means of promoting fairness and due process. Rather, the Commission intended to establish a "period of repose" in which it was shielded from last-minute interruptions and other external pressures. By ensuring that Commission decisions were made in an atmosphere of relatively calm deliberation, the Commission sought to make its decisions as objective and well-reasoned as possible and to increase the confidence of the public and the courts in the Commission's work. 2 FCC Rcd at 3020-21 ¶ 72.

40. We seek comments on whether a limited "sunshine period" should also be made applicable to circulation items. As is the case with meeting items, we are concerned that presentations made after an item has been adopted, but before release of the item, may be unduly disruptive. We ask whether we should provide for a "sunshine period" for circulation items commencing with the issuance of a news release announcing Commission action on a circulation item.

41. Additionally, one situation in particular has created a recurring problem in the application of the sunshine period prohibition. It is not uncommon for Commissioners and Commission staff to be present at widely attended meetings or symposia shortly after the adoption of items at an open Commission meeting, yet before the text of the item has been released. If these items have widespread public interest, they may be the subject of speeches or panel discussions. Commission decision-makers may be incidentally present or may even participate as speakers or panelists. Such speeches or panel discussions may technically constitute prohibited presentations in violation of the sunshine period prohibition. To avoid this concern, the Commission must undertake the burdensome process of granting a

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routine waiver.²¹ In many cases, because of this circumstance, the effect is simply to prohibit or restrict Commission participation in such events.

42. The discussion of matters at widely attended events, after the Commission has taken action at an open Commission meeting, does not appear as disruptive as direct contact with the Commission prior to the date of its action. Moreover, attempting to regulate such conduct tends to chill public discussion. We therefore seek comment on a blanket exemption from the sunshine prohibition for presentations occurring under these circumstances.²²

43. We thus invite comment on whether the sunshine period prohibition should be modified in the manner indicated. Proposed § 1.1203 sets forth our proposals concerning circulation items and widely attended events.

C. MISCELLANEOUS PROPOSALS

Proposal: require more informative notices in permit-but-disclose proceedings.

44. Our experience has given us concern with respect to the disclosure requirement in permit-but-disclose proceedings. Under 47 C.F.R. § 1.1206(a)(2), notifications filed of oral presentations in permit-but-disclose proceedings need only disclose data and arguments not already reflected in that party's earlier submissions in the proceeding. This may result in situations in which persons who believe that their presentations contain no new data or arguments either file no notification or one that is sketchy and unrevealing.

45. Accordingly, proposed § 1.1206(d)(2) would require that notifications should be filed of all oral ex parte presentations in permit-but-disclose proceedings and that all notifications should summarize the entire content of the presentation, even if the data or arguments are not "new." In addition, we propose to make clear that a mere listing of the

²¹ See, e.g., Partial Waiver of the Sunshine Prohibition, 8 FCC Rcd 7332 (1993); 7 FCC Rcd 8603 (1992).

²² Indeed, it seems questionable to regard presentations made during speeches at which Commission decision-makers incidentally happen to be present as being made "to decision-making personnel." Thus, commenters may wish to address the extent to which presentations made under these circumstances should be exempt from limitations on ex parte presentations generally.

issues discussed will not suffice. Rather, the content of the position taken on the issues discussed must be disclosed. We believe that this will result in more fairness to the parties as well as a more useful and complete record in the proceeding. Proposed § 1.1206(d)(2) also provides that if the Commission employees involved in an oral ex parte presentation believe that the summary in the notification is deficient they may request the filing of a supplemental notification or prepare a memorandum of the presentation themselves. In order to make it easier to comply with the requirement for a more detailed summary, we also believe that it may be appropriate to relax the requirement that the notification be filed the same day as the oral presentation. We propose that notifications should be filed within three days of the presentation.

Proposal: duty to bring ex parte questions to the Commission's attention.

46. We are concerned that cases may arise in which improper presentations occur because a person privately resolves doubts about the propriety of a presentation without alerting the staff and it is ultimately concluded that the person's rationale is erroneous.

47. To remedy this situation, proposed § 1.1214(b) provides that persons with reason to believe that a situation raises an ex parte question have a duty to alert the Office of General Counsel of this circumstance before engaging in ex parte contacts. The willful failure to bring questionable circumstances to the attention of the Commission's staff could be grounds for the imposition of a forfeiture or other sanction against a party or its counsel.²³ This proposal should encourage parties and counsel to exercise greater care before deciding to engage in questionable conduct. As an alternative or additional matter, commenters may wish to address whether persons proposing to make an ex parte presentation in questionable circumstances should be required to disclose to the intended recipient of the presentation why it is permissible under the rules.

Proposal: delegate to the Office of General Counsel additional authority with respect to ex parte matters.

48. The current rules provide that information concerning possible ex parte violations should be referred to the Managing Director for further action. 47 C.F.R. §§ 1.1212, 1.1214. On reflection, this responsibility would seem more appropriate for

²³ This proposal codifies the policy enunciated in Rainbow Broadcasting Co., 9 FCC Rcd 2839, 2846 ¶ 35 & n.34 (1994).

the Office of General Counsel, as the Commission's principal legal office. Indeed, the rules already provide that inquiries concerning the propriety of ex parte communications should be directed to the Office of General Counsel. 47 C.F.R. § 1.1200 Note. Moreover, as a practical matter, the Office of Managing Director routinely consults with the Office of General Counsel before exercising its responsibilities under these sections. We therefore propose to transfer responsibility for handling matters involving alleged ex parte violations under 47 C.F.R. §§ 1.1212 and 1.1214, except for placing relevant material in the public record, from the Managing Director to the Office of General Counsel.

Proposed Clarifications

49. In addition to the substantive changes discussed above, the proposed rules set forth in Appendix B reflect stylistic and minor organizational changes to clarify the rules.

IV. CONCLUSION

50. We seek comments on the above proposals and invite commenters to submit any other proposals they may have for making the ex parte rules simpler and more effective.

V. PROCEDURAL MATTERS

A. Ex Parte Rules -- Non-restricted Proceeding

51. This is a non-restricted notice-and-comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in 47 C.F.R. § 1.1206(a).

B. Regulatory Flexibility Act

52. An Initial Regulatory Flexibility Analysis is contained in Appendix A to this notice.

C. Authority

53. Authority for this rulemaking action is contained in 47 U.S.C. §§ 154(i), 154(j), 303(r), 403.

VI. ORDERING CLAUSES

54. ACCORDINGLY, IT IS ORDERED, That NOTICE IS HEREBY GIVEN of the proposed regulatory changes described above, and that COMMENT IS SOUGHT on these proposals.

55. IT IS FURTHER ORDERED, That pursuant to applicable procedures set forth in 47 C.F.R. §§ 1.415 and 1.419, comments SHALL BE FILED on or before March 16, 1995 and reply comments SHALL BE FILED on or before March 31, 1995. To file formally in this proceeding, commenters must file an original and four copies of all comments, reply comments, and supporting comments. If commenters want each Commissioner to receive a personal copy of their comments, they must file an original plus nine copies. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. In addition, commenters should file a copy of any such pleadings with the Office of General Counsel, Room 610, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554. Copies of filings may be purchased from the Commission's copy contractor, International Transcription Service, Suite 140, 2100 M Street, N.W., Washington, D.C. 20037, telephone (202) 857-3800.

56. For further information, contact David S. Senzel, (202) 418-1760, Office of General Counsel.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Secretary

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APPENDIX A**INITIAL REGULATORY FLEXIBILITY ACT ANALYSIS****Reason for Action**

The Commission has determined that the rules governing ex parte communications in Commission proceedings should be made simpler, clearer, and less restrictive. The Commission finds it appropriate to reexamine the public interest basis for the limitations on ex parte communications.

Objective

The Commission seeks to simplify and clarify the rules governing ex parte communications in Commission proceedings and to make the rules more consistent with the needs of administrative practice.

Legal Basis

Action is being taken pursuant to 47 U.S.C. §§ 154(i) and (j), 303(r), 403.

Reporting, Record Keeping and Other Compliance Requirements

This proposal would modify the requirement to report ex parte presentations in order to increase the usefulness and value of the reports and to eliminate unnecessary restrictions on ex parte presentations.

Federal Rules which Overlap, Duplicate or Conflict with the Proposed Rules

None.

Description, Potential Impact, and Number of Small Entities Affected

Small entities participating in Commission proceedings would be subject to limitations on ex parte presentations.

Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objections

None.